

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-186514

DATE: September 17, 1976

MATTER OF: El Toro Materials Co.--Request for Reconsideration

DIGEST:

1. Upon reconsideration, GAO decision which held protest initially filed with agency on April 26, 1976, and with GAO on May 13, 1976, untimely, is affirmed. Agency's action of proceeding with bid opening on April 27, 1976, despite protester's request for cancellation of sale can only be interpreted as prejudicial to protester's position and "adverse agency action," which we have recognized may precede formal denial of protest.
2. Alleged failure of agency to provide additional information concerning property to be sold prior to bid opening is not issue significant to procurement practices or procedures.

By letter dated July 30, 1976, counsel for El Toro Materials Co. (El Toro) has requested reconsideration of our decision in El Toro Materials Co., B-186514, June 14, 1976, 76-1 CPD 373, in which we declined to consider El Toro's protest (filed May 13, 1976) on the merits based on an untimely filing. El Toro alleged improprieties in solicitation GS-09-D(R) 76-8, issued by the General Services Administration (GSA), for the sale of earth fill material from El Toro Marine Base, Orange County, California. "After unsuccessfully attempting to clarify alleged discrepancies, ambiguities, omissions, and contradictions in the solicitation," El Toro protested to GSA on April 26, 1976, asking that the proposed sale be canceled. Though aware of the protest and request by El Toro for cancellation, the contracting officer, nevertheless, proceeded with bid opening on April 27, 1976.

Our decision of June 14, 1976, stated that in our view initial adverse agency action occurred on April 27, 1976, when the contracting officer proceeded with the sale despite knowledge of El Toro's protest and request for cancellation. Since El Toro did not file its protest with our Office within 10 days of initial adverse agency action, we held that pursuant to our Bid Protest Procedures, 4 C.F.R. § 20.2(a) (1976), the protest was untimely and not for consideration on the merits.

In its request for reconsideration, counsel for El Toro contends that initial adverse agency action did not occur on April 27, 1976 (as indicated in our decision), but on May 6, 1976, when El Toro received formal notification of the denial of its protest. Counsel argues that bids received on April 27, 1976, were subject to evaluation, rejection, and readvertisement because of inadequate or ambiguous specifications at the discretion of the contracting officer. Counsel stresses that El Toro was protesting the sale of earth fill material, and not bid opening, per se. Therefore, counsel contends it was on May 6, 1976, that adverse agency action occurred.

Section 20.0(b) of our Bid Protest Procedures, supra, defines "adverse agency action" as "* * * any action or inaction on the part of contracting agency which is prejudicial to the position taken in a protest filed with an agency."

In the instant case, as indicated previously, El Toro protested to GSA before bid opening and asked that the sale of earth fill material be canceled because of a defective solicitation. Though counsel for El Toro is correct in stating that the Federal Procurement Regulations (FPR) provide for cancellation of an invitation for bids after bid opening under appropriate circumstances, see, e.g., FPR § 1-2.404-1(b)(1) (1964 ed. circ. 1), after receiving El Toro's protest and request for cancellation, GSA proceeded with bid opening, the first step in the process of award and sale, indicating disagreement with the basis of protest. In these circumstances, we conclude that the agency's action of proceeding with bid opening despite El Toro's protest could only be reasonably interpreted as being prejudicial to El Toro's position and, therefore, as an "adverse agency action."

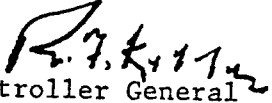
In this regard we note that section 20.2(a) of our Bid Protest Procedures, supra, makes clear that we are concerned with initial adverse agency action, which we have recognized may precede formal notification of denial of a protest by an agency. See Verne Woodrow Contractor, Inc., B-184921, October 28, 1975, 75-2 CPD 259; Micronics International, Inc., B-185910, May 11, 1976, 76-1 CPD 308.

In the alternative, counsel argues that GSA's alleged failure to provide additional information to El Toro, concerning the property to be sold, prior to bid opening as provided for in the IFB, and as allegedly orally promised by GSA, constitutes an issue significant to

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procurement practices pursuant to section 20.2(b)(3)(c) of our Bid Protest Procedures, supra, and that the protest should therefore be considered on the merits, despite the fact that it is untimely.

In this regard, we have held that "* * * 'Issues significant to procurement practices or procedures' refers * * * to the presence of a principle of widespread interest * * *." In this connection, see Inflated Products Company, Inc., B-183947, March 11, 1976, 76-1 CPD 170, in which we further defined this principle as involving cases where a bidder or offeror is precluded from competing on an equal basis, contrary to the basic principles of the law and regulations governing the conduct of procurements. We do not agree that the issue presented here constitutes a "significant issue," and our decision not to consider the protest on the merits is affirmed.


Deputy Comptroller General
of the United States